No. 14,732

IN THE

United States Court of Appeals

For the Ninth Circuit

PACIFIC HOMES, INC., a corporation,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

OPENING BRIEF FOR APPELLANT.

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Subject Index

Table of Authorities Cited

Cases

Codes

Rules

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STATEMENT AS TO JURISDICTION.

This is an action by Appellant (plaintiff below), a California corporation, to recover from Appellee (defendant below), certain United States Income Taxes and United States Excess Profits Taxes which Appellant claims were erroneously and illegally collected by Appellee from Appellant (R. 3, 16, 17).

The District Court had jurisdiction under Title 28, U.S.C., Sec. 1340, 1346. Such jurisdiction is alleged in the complaint (R. 5, 8, 11, 14), and is admitted in the answer (R. 18, 19, 20, 21).

The complaint prayed for judgment against Appellee in the amount of $141,041.48, with interest thereon (R. 16, 17). The case was tried to the Court without a jury (R. 49).

Judgment was rendered on February 16, 1955 that Appellant take nothing by its action and that its action and complaint be dismissed without costs (R. 50). The trial Court filed a Memorandum Opinion (R. 39).

Timely Notice of Appeal was filed on March 10, 1955 (R. 50, 51).

Hereinafter in this brief, Appellant will be sometimes referred to as plaintiff, because such reference will be more consistent with the record to which reference is being made. Correspondingly, Appellee in some cases, for convenience, may be referred to as defendant.

STATEMENT OF THE CASE.

The issue in this case involves the treatment, for federal income and excess profits tax purposes, of gains derived by plaintiff-appellant from the sale of single family dwelling houses constructed at defense housing projects known as Southwood, Shoreview and Homewood. All of the houses involved in this appeal were held more than six months prior to sale (R. 90, 91), and all had been leased prior to sale, either under simple leases or under leases with option to buy (Finding 5, R. 45). The leases with option to buy (356 in number, R. 75) were in all cases for a

term of 30 months and permitted, but did not compel, the tenant to purchase the house within that period. The simple leases contained no option to buy (R. 71). Of this latter type, 210 were for the term of 12 months, and 5 were month to month tenancies (R. 75).

The Court correctly states in its opinion:

> "Plaintiff's position is that the profits which resulted from their sales of defense housing were subject to the capital gains tax of 25% under Section 117(j) of the U. S. Internal Revenue Code. Defendant claims that the profits from the sales of defense housing should be taxed at ordinary income and excess profits tax rates in the same manner as if the houses constituted property held by plaintiff primarily for sale to customers in the ordinary course of its trade or business." (R. 39.)

Full information respecting the number and types of leases appears in Appellant's Exhibit 11 (R. 75). Full information as to the lease and sale history of the homes by months appears in Exhibits 5, 6 and 7 annexed to the Stipulation on file (R. 36, 37 and 38). Full information as to rents received (R. 33), profit from real property sales (R. 34), and investment in real property (R. 35) appears in Exhibits Nos. 2, 3 and 4 attached to the Stipulation (R. 33, 34 and 35).

This appeal involves the sufficiency of the evidence to support certain findings and the failure of the Court to find in accord with the evidence.

The Court made findings of fact which are numbered from 1 to 16, inclusive. For the Court's con-

venience, we tabulate below the findings which we accept; those which we accept with a reservation, and those which form the basis for the claims in our Specification of Errors:

Findings which we accept: 1, 2, 4, 5, 9, 10, 11 and 13.

Accepted with a reservation: 7 and 15.

Claimed by Appellant to be Erroneous in whole or in part: 3, 6, 8, 12, 14 and 16.

The material which follows in this statement of the case has been taken from the above listed findings which we accept together with findings 7 and 15 which we accept with a reservation.

The action was brought pursuant to 28 U.S.C., Section 1346(a)(1) (R. 43) by plaintiff against the United States of America, for the refund of corporate Excess Profits Taxes, plus interest for the fiscal years ended May 31, 1945 and May 31, 1946; also for the refund of corporate income taxes for the fiscal years ended May 31, 1945 and May 31, 1947, with interest (Finding 1 rephrased, R. 43, 44).

By stipulation, the parties agreed that in the event the Court orders judgment in favor of appellant, and the parties are unable to agree upon the principal amount of the judgment and/or interest, each party should have the right to offer such additional evidence as may be pertinent to a determination of the amount of such judgment, and any interest thereon (Stipulation, R. 29).

Plaintiff was incorporated under the laws of the State of California on August 9, 1941, and was dis-

solved on May 31, 1947. Twenty-six shares of plaintiff's stock were originally issued to David D. Bohannon, who sold such shares to plaintiff's treasury on May 10, 1945. Twenty-four shares of plaintiff's stock were originally issued to Ross H. Chamberlain who, after May 10, 1945, was the sole stockholder of plaintiff corporation (Finding 2; R. 44).

On or about September 1, 1942, plaintiff completed the construction of 212 single-family dwelling houses in a subdivision known as "Homewood Tract". On or about January 1, 1944, plaintiff completed the construction of 72 single-family dwelling houses in a subdivision known as "Southwood Tract". On or about February 1, 1944, plaintiff completed the construction of 63 single-family dwelling houses in a subdivision known as "Shoreview Tract" (Finding 4, R. 44).

Seven of the houses in the Shoreview Tract were sold in the last three months of 1943 immediately upon construction. All 212 houses in the Homewood Tract were initially rented, after construction, to defense workers under leases containing options in the tenants to purchase the houses within 30 months. All of the houses in the Southwood Tract and the unsold houses in the Shoreview Tract were initially rented, after construction, without options in the lessees to buy the houses (Finding 5, R. 45).

Renting the Homewood Tract houses with purchase options in the tenants was an effective sales device in that it created a ready-made sales market for those houses. Such houses were necessarily held for sale

to tenants if they decided to exercise their options. Plaintiff voluntarily and without any compulsion from Federal Governmental agencies or other third parties granted the options to buy to the lessees of the Homewood Tract houses. Renting with option to buy was a method of doing business (Finding 7, R. 45).

(In conceding the correctness of this finding 7, we do so because, by its terms it is limited in its application to transactions at Homewood and refers to operations under lease-option arrangements. WE CONCEDE ON THIS APPEAL THAT SALES MADE BY PLAINTIFF AT HOMEWOOD BY THE EXERCISE OF A LEASE OPTION, ARE SALES TO CUSTOMERS PRIMARILY IN THE COURSE OF TRADE OR BUSINESS. THE DECISION OF THIS COURT IN ROLLINGWOOD v. C. I. R., 190 Fed. (2d) 263; CCA9, 1951, SO HELD. WE STATE MOST EARNESTLY HOWEVER, THAT EXCEPT IN THE SINGLE SITUATION WHERE THE SALE IS MADE BY THE EXERCISE OF A LEASE OPTION, THE REASONING OF THE ROLLINGWOOD CASE, WHEN APPLIED TO ALL THE FACTS OF OUR CASE, COMPELS A DECISION IN FAVOR OF APPELLANT.)

Commencing in June, 1944, and continuing through April, 1946, 137 houses in the Homewood Tract were sold to tenants exercising options in their leases to purchase. Commencing in April, 1945, and continuing through August, 1946, the remaining 69

houses in the Homewood Tract were sold to persons without options to buy (Finding 9, R. 46).

Commencing in April, 1945, and continuing through July, 1946, all 72 houses in the Southwood Tract were sold (Finding 10, R. 47).

Commencing in April, 1945, and continuing through June, 1946, all remaining 56 houses in the Shoreview Tract were sold (Finding 11, R. 47).

In addition to the sales of houses in Homewood, Southwood and Shoreview Tracts, plaintiff sold all of its houses in three other tracts, not here in issue, during the fiscal years ending May 31, 1946, and May 31, 1947, plaintiff having acquired such other tracts in its fiscal year ending May 31, 1946. Plaintiff went out of business and dissolved on May 31, 1947 (Finding 13, R. 47).

Because of the wartime and postwar demands for houses, plaintiff's houses were sold without the necessity of engaging in extensive advertising or sales campaigns. The houses in effect sold themselves. The absence of "For Sale" signs on the tracts had a sales motive and was a deliberate sales technique of plaintiff to give prospective costumers a sense of scarcity of available houses for sale and thereby make the house being sold seem more desirable. Most of the sales were made by plaintiff's salaried tract managers but where their efforts were not sufficient, sales were effected through real estate brokers on a commission basis (Finding 14, R. 47).

For reasons set forth hereafter, we take issue with the last sentence of Finding 14 reading:

"Plaintiff's selling activities under the circumstances, together with the frequency and continuity of sales, were sufficient to constitute a trade or business of selling houses." (Finding 14, R. 48).

The houses in the Homewood Tract which were sold to tenants pursuant to options to buy were held primarily for sale to customers in the ordinary course of plaintiff's trade or business from the time the lease-option agreements were executed (Finding 15, R. 48).

In accepting this finding to be correct, we do so because it is limited to sales pursuant to options at Homewood Tract. This is consistent with the reservation made by us concerning Finding 7 (Ante p. 6).

SPECIFICATIONS OF ERRORS RELIED UPON.

When in this brief, reference is made to "houses here in issue", it will refer to ALL sales of Southwood Tract, ALL sales at the Shoreview Tract (other than the 7 houses sold immediately on construction, Finding 5, R. 45) and sales of 55 houses at HOMEWOOD[1] on which the original lease had expired and

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[1]The "houses here in issue," insofar as the Homewood Tract is concerned, include only the 55 houses listed in column 2 of appellant's Exhibit No. 5 (App. p. iii). The sales of 141 houses at Homewood, appearing in column 1 of Exhibit No. 5 are excluded from consideration on this appeal because the Court found (Finding 7, R. 46, and Finding 15, R. 48) that the renting of such houses with an option to buy, was a method of doing business and that such houses, when sold, were held primarily

the houses were thereafter leased on simple leases without option to buy.

Appellant specifies the following listed errors:

1. The Court erred in finding and concluding without any supporting evidence, that the houses here in issue were ever held primarily for sale to customers in the ordinary course of appellant's trade or business. This specification of error embraces the subject matter contained in Findings 3, 8, 12, 14 and 16 (R. 44-48).

2. The Court erred in finding and concluding without any supporting evidence, that the Board of Directors of appellant on December 9, 1943, authorized the future sale of appellant's houses and that the Chairman of the Board of Directors of appellant expressed the intention of appellant to sell its houses; that thereafter appellant's intention was to pursue whichever activity, renting or selling, proved more profitable (see Finding 6, R. 45).

3. The Court erred in failing to find and conclude on the evidence, that the houses here in issue were held as an investment for the purpose of renting such houses to defense workers, and were so held at

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for sale to customers in the ordinary course of appellant's trade or business. This finding is consistent with the decision of this Court in the case of *Rollingwood v. Commissioner of Int. Rev.*, 190 Fed. (2d) 263, CCA 9, 1951. The additional sales at Homewood Tract, 16 in number, shown in columns 3 and 4 of appellant's Exhibit No. 5, R. 36 (App. p. iii) are also excluded from consideration on this appeal because some of the facts concerning these transactions could not be ascertained with sufficient certainty to properly present the matter on this appeal.

the time appellant decided to liquidate said houses and in failing to find and conclude on the evidence that early in May, 1945, appellant decided to liquidate the houses here in issue.

4. The Court erred in failing to find and conclude on the evidence, that prior to early May, 1945, appellant did not sell any of the houses here in issue with frequency or continuity.

5. The Court erred in failing to find and conclude on the evidence, that after Appellant decided to liquidate the houses here in issue, the method by which Appellant sold said houses here in issue did not amount to going into the business of selling houses to customers in the regular course of trade or business, and that in making such sales, Appellant did not thereby enter the real estate business or make sales in the manner in which such a business is ordinarily conducted.

6. The Court erred in failing to find and conclude on the evidence, that appellant's decision to liquidate the houses here in issue was caused by misuse of the properties by tenants, and adverse economic conditions incident to the end of hostilities in Europe.

7. The Court erred in failing to find and conclude on the evidence, that appellant's sales of the houses here in issue were sales in the course of liquidation of its investment in said houses.

8. The Court erred in concluding as a matter of law, that the income received by appellant from the sale of the houses here in issue in the fiscal years

ended May 31, 1945, May 31, 1946, and May 31, 1947, was taxable as ordinary income.

9. The Court erred in failing to conclude as a matter of law, that the gain realized by appellant from the sale of the houses here in issue, held for more than six months, should be taxed as long-term capital gain instead of as ordinary income, and in failing to determine the amount to which appellant is entitled by way of judgment under paragraph 15 of the Stipulation in evidence (R. 29).

SUMMARY OF ARGUMENT.

The record will show that the houses here in issue were constructed with an original intent on the part of Appellant to hold them for rental. This original rental intent was recognized by the trial Court. In its opinion (R. 40) the Court stated that this original rental intent was later changed by "frequent sales".

The record shows that these "frequent sales" mentioned by the Court consisted of only 15 sales of houses here in issue from September, 1942, to April 30, 1945. Even these 15 sales include the sale of 7 houses at Shoreview immediately upon completion, because appellant considered an impending overpass construction to be detrimental (R. 133). Such 15 sales, when considered in connection with the number of houses in each Tract (212 in Homewood, 72 in Southwood, and 63 in Shoreview) cannot be consid-

ered sufficiently frequent to support the conclusion that Appellant's intent changed from a rental operation to that of engaging in the real estate business.

The record shows that a substantial rental operation was conducted by appellant continuously until on or about VE Day. The findings of the Court are consistent with this position, with the possible exception of Finding 6. As will be shown hereinafter, Finding 6 has no support in the record.

The decision by appellant to liquidate which was made on or about VE Day, resulted from a number of factors, such as the misuse of the properties by tenants and adverse economic conditions, such as vacancies. The almost nominal rate of return on appellant's investment to May 31, 1945 (2%-3% *before deducting any amounts for administrative expense;* R. 110-112) certainly supported this decision.

The record also shows that the method pursued by appellant in liquidating its rental operation involved none of the techniques ordinarily pursued by firms engaged in the business of selling real property. The sales were made without advertising or sales campaigns and without the use of "For Sale" signs.

The decisions to be cited hereinafter establish the right of a taxpayer to liquidate a housing project without losing the benefit of the capital gain treatment permitted by section 117(j) U. S. Internal Revenue Code. Appellant's liquidation procedure conformed with the requirements of the decisions authorizing capital gain treatment.

ARGUMENT.

1. THE COURT ERRED IN FINDING AND CONCLUDING WITHOUT ANY SUPPORTING EVIDENCE THAT THE HOUSES HERE IN ISSUE WERE EVER HELD PRIMARILY FOR SALE TO CUSTOMERS IN THE ORDINARY COURSE OF APPELLANT'S TRADE OR BUSINESS AND THE COURT FURTHER ERRED IN FAILING TO FIND AND CONCLUDE ON THE EVIDENCE, THAT THE HOUSES HERE IN ISSUE WERE HELD AS AN INVESTMENT FOR PURPOSES OF RENTING SUCH HOUSES UNTIL SAID HOUSES WERE SOLD PURSUANT TO A DECISION TO LIQUIDATE THEM, WHICH LIQUIDATION DID NOT AMOUNT TO GOING INTO THE BUSINESS OF SELLING HOUSES TO CUSTOMERS IN THE REGULAR COURSE OF A TRADE OR BUSINESS.

In this case, which was tried to the Court without a jury, the Court made certain findings of fact (R. 43-48), and filed a Memorandum of Opinion (R. 39-43).

Stated briefly, the Court found that the houses here in issue were held by Appellant primarily for sale to customers in the ordinary course of appellant's trade or business (Findings 3, 6, 8, 12, 14 and 16; R. 44-48). The Court concluded from these findings that the income received by appellant from the sale of its houses was taxable as ordinary income and not as capital gain (R. 48).

The ultimate question is whether the Findings are supported in the record. *Pacific Portland Cement Co. v. Food Machinery & Chemical Corporation,* 178 Fed. (2d), 541, at page 548.

A finding is "clearly erroneous" under Rule 52(a) of the Federal Rules of Civil Procedure when, although there is evidence to support the Finding, the reviewing Court on the entire evidence is left with the

definite and firm conviction that a mistake has been committed. *United States v. U. S. Gypsum Co.,* 333 U. S. 364, 395 (1948).

A substantial portion of the evidence in this case is in the form of Exhibits, such as Exhibits 5, 6 and 7 to the Stipulation (R. 36-38), and Exhibit 11 (R. 75). These Exhibits show in detail the number of houses in the three tracts here involved, the sales by months of such houses, the leases of same, and other data. This evidence is uncontradicted. We are confident that when this Court examines these Exhibits and all of the other evidence, the conclusion will be inescapable that on the entire evidence, a mistake has been committed.

The statute involved is section 117(j) of the 1939 United States Internal Revenue Code. The pertinent portion of section 117(j) is quoted in the Appendix hereto (p. i). This section provides that gains from the sales of "Property used in the trade or business" shall be considered as gains from the sale of capital assets (Sec. 117(j)(2); App. p. i).

To qualify as "Property used in the trade or business" under the statute, the property may be ". . . real property used in the trade or business, held for more than 6 months". The houses here in issue meet these qualifications because:

(a) They constitute real property;

(b) They were all rented after construction (Finding 5; R. 45). In *McGah v. Commissioner,* 210 Fed. (2d) 769; C.C.A. 9, 1954, this Court held under similar circumstances that the petitioners

"used the houses by renting them"; (210 Fed. (2d) at page 770).

(c) They were all held more than six months (R. 90, 91).

Another test applied by the statute is that property which would otherwise qualify as "Property used in the trade or business" will not be so classified if it is ". . . property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business . . ." (Sec. 117(j)(1); App. p. i).

Appellant will show in the following pages of this brief that there is no evidence to support the finding that the houses here in issue were held by Appellant primarily for sale to customers in the ordinary course of its trade or business and that on the contrary when the Court considers the entire evidence, it will be apparent that Appellant held the houses here in issue for rental purposes until they were sold, and further, that such sales were conducted in a manner which did not constitute going into the real estate business or selling to customers in the regular course of a trade or business.

(a) Appellant's Original Intent Was to Hold the Houses Here in Issue for Rental Purposes.

Shoreview Tract (63 houses) and Southwood Tract (72 houses) applications for priority assistance to build the homes specified they would be built for rent to defense workers and the houses were so rented (Stipulation, R. 25; Finding 5, R. 45).

In the Homewood Tract (212 houses) the first application for priority assistance filed on December 31,

1941, for 175 houses stated the houses would be built for sale (Stipulation, R. 25). However, at the request of the War Production Board (R. 139), the stated intention to sell was not carried out and, instead, all of the houses, when completed, were rented on the rental option plan; i.e., they were originally rented under a written lease giving the tenant a 30-month option to purchase (Stipulation, R. 25, 26, Finding 5, R. 45).

Mr. Chamberlain testified that the original intent of appellant in the construction of the Southwood Tract homes was to rent them (R. 123, 124). Mr. Chamberlain testified that Appellant's intent in the acquisition of houses in the Shoreview Tract was the same as he described in connection with Southwood (R. 126). Mr. Chamberlain also testified that the intention of the management and Board of Directors of Appellant was to construct houses for rent in Sunnyvale (Homewood Tract) rather than construct houses for sale (R. 128).

(b) The Houses Here in Issue Were in Fact Rented for Many Months in a Substantial Rental Operation.

Rental collections at the Homewood, Southwood and Shoreview Tracts were as follows during the five fiscal years of appellant's existence (R. 33):

FISCAL YEAR		HOMEWOOD	SOUTHWOOD	SHOREVIEW
May 31, 1943		$ 83,480.81	None	None
May 31, 1944		109.011.97	$11,961.32	$14,590.08
May 31, 1945		94,085.78	42,945.16	32,645.63
May 31, 1946		28,585.50	26,430.60	18,460.41
May 31, 1947		627.80	(65.03)	115.00
TOTAL	462,875.03	315,791.86	81,272.05	65,811.12

Rental collections in the amount of $462,875.03 from the three Tracts here involved show that the original stated intention to rent was carried out in an extensive rental operation.

Reference will be made hereinafter in this brief to a decision made by appellant on or about VE Day (May 10, 1945) to sell the houses as they became vacant (R. 143, 145). The foregoing tabulation of rental collections shows that in the fiscal year following such decision; that is, in the fiscal year ended May 31, 1946, rental collections from the three Tracts amounted to $73,476.51. In other words, the rental operation of appellant was continued during the period of liquidation.

Significant, also, on the matter of appellant's intent to carry on a rental operation is the practice which was followed in leasing houses. The facts are set forth in appellant's Exhibit 11 (R. 75) which are as follows:

Data Re Number and Types of Leases

TRACT	TOTAL LEASES GIVEN	30 MONTH OPTION LEASES	NON-OPTION LEASES		
			TOTAL	MONTH TO MONTH	12 MONTHS
Homewood	419	356	63	5	58
Southwood	89	None	89	None	89
Shoreview	63	None	63	None	63

Comparing the number of houses located in each tract with the number of leases executed, we find:

(a) Homewood Tract. Here, a total of 419 leases were given. Only 212 houses were originally built in this Tract (Stip., R. 25). Some houses were leased 4 times (R. 76). After De-

cember 10, 1943 only non-option leases were executed, 58 of which were for 12 month terms (R. 75).

(b) Southwood Tract. Here a total of 89 leases were given, each for a 12 month term. Only 72 houses were originally built in this tract (Stip. R. 25).

(c) Shoreview Tract. Here a total of 63 leases were given—each for a 12 month term. 63 houses were originally built (R. 25), but only 56 houses were available for rent, after excluding the 7 houses which were sold immediately upon construction (Finding 5, R. 45) because of an impending overpass construction (R. 133).

Leasing defense houses for 12 month terms and without purchase options is wholly inconsistent with holding such houses primarily for sale in the ordinary course of a trade or business. A house subject to a 12 month lease term cannot be delivered to a purchaser (without the tenant's consent) and hence cannot be held by the owner primarily for sale to customers.

Successive leasing of houses as above indicated instead of selling the same upon the first vacancy evidences an intent to hold and use the houses in a rental operation.

(c) Appellant's Intent to Hold and Use the Houses Here in Issue in a Rental Operation Continued Until Appellant's Decision to Liquidate in Early May, 1945.

We have previously shown that the original intent of appellant in developing the war housing tracts at Homewood, Southwood and Shoreview was to rent the housing units, and that such intention was evidenced by an extensive rental operation which continued not only until VE Day (May 10, 1945), but also beyond that date.

The record shows that the intent to carry on an exclusively rental operation with respect to the houses here in issue continued until VE Day (May 10, 1945), on or about which date a change in policy occurred, and thereafter the houses here in issue were sold as they became vacant (R. 143-145).

Finding 16 (R. 48) recognizes that the houses here in issue were held for rental prior to and until the decision was made to sell the houses as they became vacant (the date of this decision is not stated in the finding but is fixed by the record (R. 143) as on or about VE Day, May 10, 1945). This finding declares that the houses here in issue

> ". . . were held primarily for sale to customers in the ordinary course of plaintiff's trade or business *from the time when the decision was made,* prior to the sales in question, *to sell all houses as they became vacant,* including those not subject to lease-option agreements". (Italics supplied.)

Finding 16 (R. 48), in stating that the houses were held for sale to customers ". . . *from the time when the decision was made . . .*" recognizes that *before*

that time, the houses here in issue were dedicated to a rental operation. We do not accept Finding 16 to the extent that it states that from the date of such decision, the houses here in issue ". . . were held primarily for sale to customers . . ."

Finding 8 (R. 46) reads in part:

> "After several months of rental experience plaintiff found it to be unprofitable to continue to rent any of its houses. Plaintiff *thereupon* decided to hold all of its houses in the Homewood, Southwood and Shoreview Tracts primarily for sale to customers in the ordinary course of business in addition to those houses in the Homewood Tract which were already held by plaintiff primarily for sale under outstanding lease-option agreements. The tract managers were *then* instructed by plaintiff to sell the houses as they became vacant . . ." (Italics supplied.)

Neither finding 8 nor finding 16 specifies by particular date the time that the decision was made to sell the houses here in issue as they became vacant. However, finding 8 fixes the date it was decided to sell the houses as they became vacant when it declares that the tract managers were "then" instructed by plaintiff to sell the houses as they became vacant. The record fixes this date as VE Day (R. 135, 136).

Finding 8 (R. 46) and finding 16 (R. 48) thus support appellant's position that until on or about VE Day, when the decision was made to sell the houses as they became vacant, all of the houses here in issue were used in a rental operation.

Except for an immaterial difference of a few days, the conclusion that the houses here in issue were

used in a rental operation until on or about VE Day (May 10, 1945) is consistent with and supported by findings 9, 10 and 11 (R. 46, 47). Findings 9, 10 and 11 declare that "Commencing in April, 1945" the remaining 69 houses in Homewood Tract (only 55 of which are here in issue); all 72 houses in the Southwood Tract, and all remaining 56 houses in the Shoreview Tract were sold.

Thus, the evidence and the findings support Appellant's showing that it intended to and did hold and use the houses here in issue in a rental operation until the decision to liquidate was made. The only difference—which is not material—is that some of the findings refer to the sales "Commencing in April, 1945" whereas the evidence shows that the actual decision to liquidate was made on or about VE Day (May 10, 1945).

This leads to the next questions, namely, the circumstances which prompted appellant's decision to liquidate and the method by which appellant sold the houses. These questions will now be considered.

(d) Appellant's Decision to Liquidate in Early May, 1945 Resulted From a Combination of Factors, to-wit, Misuse of the Properties by Tenants, and Adverse Economic Conditions Incident to the End of Hostilities in Europe.

The testimony of Mr. Chamberlain shows that it was not until VE Day (May 10, 1945) that appellant reached a decision to sell the houses to persons as the houses became vacant (R. 143, 145). The record shows that the decision to liquidate appellant's investment in the Homewood, Southwood and Shoreview Tracts

was the result of a combination of factors which may be summarized as follows:

1. **The Misuse of the Properties by Tenants.**

The uncontradicted testimony of Mr. Chamberlain was that the tenants gave the houses terrible treatment in many cases. In some instances the tenants would leave and take everything they could unscrew; that "It was awfully expensive" (R. 133, 134). Mr. Chamberlain testified that he felt appellant was morally bound to put the house in as nearly the same condition for the next person as the first one, which meant that appellant had to repaint and fix them all up, and it ran into a lot of money; that in the big tracts there were service departments that did not do anything but go around fixing up after these withdrawals (R. 133, 134).

2. **Adverse Economic Conditions Incident to the End of Hostilities in Europe.**

The uncontradicted testimony of Mr. Chamberlain (R. 134, 135) was that in about the spring of 1945 it appeared that the war was about over and the imminent departure of all of appellant's tenants could be expected. (The houses were single family defense housing dwellings, constructed in critical war effort areas. Stipulation, Pars. 6 and 11; R. 25, 28.)

Mr. Chamberlain stated that the Telephone company, Pacific Gas & Electric Company, and Bank of America made post war surveys as to what the business situation was going to be some time after the war, and their conclusions were so pessimistic that he began to wonder, specially when people moved out

of appellant's houses and left them in a terrible condition; further, that along about May or June of 1945, it was getting pretty difficult to find new tenants. Mr. Chamberlain further testified that the lawns were growing up with weeds; that appellant had to provide someone to mow the lawns and water them, so that they wouldn't be lost and in order to keep the tract looking nice (R. 135).

Mr. Chamberlain further testified:

> "It got to be too expensive to, so I decided perhaps it would be better for the Corporation to dispose of these houses as they became vacant rather than continue to try to rent them all. Although we didn't keep any houses vacant. If somebody came along and wanted to rent a vacant house and didn't want to buy it, why, he was privileged to rent it, just so we would have someone in there that would pay the Bank every month instead of us—I mean, instead of the Corporation." (R. 135.)

On the question of appellant's obligation to make monthly payments to the Bank on each house, it should be noted that each of the houses owned by appellant was subject to a separate construction loan, and a separate promissory note and deed of trust was executed by appellant for each such loan (Stipulation, paragraph 13, R. 28). Mr. Chamberlain's uncontradicted testimony is that a lot of appellant's houses became vacant in the spring of 1945 (R. 133).

The actual and potential vacancies are an important factor in determining whether *any* rental operation shall continue, but in appellant's case the actual and

potential vacancies assumed a position of critical importance, because they resulted not only in a loss of revenue, but also required appellant to obtain from other sources the funds necessary to make the monthly loan payments to the lending institution.

In summary, it can be said that the decision made at or about VE Day (May 10, 1945), to liquidate was a decision induced by economic factors over which appellant had no control, which economic factors were just as compelling as the pressure applied by the Central Bank in the case of *McGah v. C. I. R.,* 210 Fed. (2d) 769; CCA 9, 1954. Appellant is not required to wait until vacancies, misuse of premises, etc., *force* the lending institution to demand a sale of the premises in order to establish in appellant a right to capital gain treatment. On the contrary, to appellant's credit, appellant recognized the economic pressure and made the decision to liquidate at the time and in a manner which rendered it unnecessary for the lending institution to apply direct pressure to force sales of the houses as in *McGah v. C. I. R.,* 210 Fed. (2d) 769, CCA 9, 1954. This procedure should not deprive appellant of the right to capital gain treatment.

(e) Appellant's Sales of Houses Here in Issue Were Not Frequent and/or Continuous Prior to Early May, 1945, the Date of Appellant's Decision to Liquidate.

In the case of *Rollingwood v. Commissioner,* 190 Fed. (2d) 263, CCA 9, 1951, the frequency and continuity of sales were considered potent factors in determining the intent of the taxpayer. The Court there had the following to say in applying this fre-

quency and continuity test to the facts of the *Rollingwood* case:

> ". . . In the instant case we have frequent and periodic sales commencing in the first fiscal year that the project was in existence and continuing throughout the entire period in question. We think the fact that 28 sales of houses were made in the first fiscal year and 178 sales in the second fiscal year of Rollingwood's existence *to persons who did not have rental-option agreements or to whom Rollingwood was under no obligation to sell is very persuasive evidence of the purpose for which the houses were held.* Petitioners insist that the sales were passive in that there were no 'for sale' signs and no sales force. But the number of sales speak for themselves". (190 Fed. (2d) 263, at page 267. Emphasis supplied.)

Applying the same test in our case, the results are as follows:

NUMBER OF HOUSES SOLD TO PERSONS TO WHOM APPELLANT WAS UNDER NO OBLIGATION TO SELL (EXCLUDES RENTAL-OPTION SALES)

	FISCAL DATES FROM COMPLETION OF TRACT					
TRACT	FIRST FISCAL YEAR	SECOND FISCAL YEAR	THIRD FISCAL YEAR	FOURTH FISCAL YEAR	FIFTH FISCAL YEAR	TOTAL
Rollingwood	28	178	136	173	0	515
Homewood	0	2	8	52	9	71
Shoreview	7[2]	1	54	1	0	63
Southwood	0	8[3]	57	8	0	73
Total	7	11	119	61	9	207

[2]These seven houses at Shoreview were sold immediately upon construction, because appellant feared an impending overpass (R. 133).

[3]These 8 houses at Southwood were sold in the last 2 months of second fiscal year after being held for 15-16 months, and 1 was sold twice (App. p. iv).

These figures (to use the language of the Court in the *Rollingwood* case) speak for themselves. During the first two fiscal years the sales at Rollingwood were continuous and frequent. At Appellant's Tracts they were neither frequent nor continuous. At Rollingwood there were *206* houses sold in the first two fiscal years to persons who *did not have rental option agreements.* In our case *18* such sales in the first two fiscal years, scattered over three tracts, were neither frequent nor continuous.

Further evidence that appellant's sales of houses were neither frequent nor continuous is furnished by the Exhibits accompanying the Stipulation, to-wit:

(a) At Homewood Tract, out of *212* houses completed by September 1, 1942, *203* of these houses were still on hand two years later; (App. p. iii); and

(b) At Southwood Tract, *all* of the 72 houses completed by January 1, 1944 were still on hand 15 months later; (App. p. iv); and

(c) At Shoreview Tract (except for the seven houses explained in the footnote, ante, p. v), *all* of the 63 houses completed by February 1, 1944 were still on hand 14 months later (App. p. v).

The record thus shows that there was neither frequency nor continuity to appellant's sales prior to the date appellant decided to liquidate, namely, prior to VE Day, May 10, 1945. The frequency and continuity test cannot be applied after appellant's

decision to liquidate was made because frequent and continuous sales are a normal part of a liquidation process.

The significance of the frequency and continuity test in the *Rollingwood* case was that such test showed that *from the inception,* that is, *in the first two years* of Rollingwood's operations, there were frequent and continuous sales. The facts in our case are directly contrary in that, excluding lease option sales, there were only *18* sales of houses in the first two years including the 7 houses sold at Shoreview because of an impending overpass. The decision in the *Rollingwood* case cannot apply to appellant because of the basic factual differences in the number, type and times of sales of the houses involved.*

In our case, excluding lease option sales, we have an uninterrupted and exclusively rental operation from completion of the Homewood Tract in September, 1942 (App. p. iii) until on or about May 10, 1945, with a gradually reduced rental operation thereafter, as liquidation commenced and continued. The situation in Rollingwood is directly contrary. In that case there was no continuous rental operation for many months, followed by a determination to liquidate. Instead, in the *Rollingwood* case frequent, continuous and unexplained sales were made *immediately* after the tracts were completed, and these sales continued throughout the entire period of the *claimed* rental operation.

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*Gains from lease option sales are not in issue on this appeal.

(f) The Method by Which Appellant Sold the Houses Here in Issue Did Not Amount to Entering the Real Estate Business or Making Sales in the Manner in Which Such Business Is Ordinarily Conducted.

The authorities are clear as to the effect that a housing project may be liquidated without losing the benefits of the capital gain provisions contained in Sec. 117(j) of the U. S. Int. Rev. Code.

Robert W. Dillon v. Commissioner of Int. Rev., 213 Fed. (2d) 218, CCA 8, 1954;

Victory Housing No. 2, Inc. v. Commissioner of Int. Rev., 205 Fed. (2d) 371, CCA 10, 1953;

Delsing v. United States, 186 Fed. (2d) 59, CCA 5, 1951;

Winnick v. Commissioner of Int. Rev., 199 Fed. (2d) 374, CCA 6, 1952;

Lucille McGah v. Commissioner of Int. Rev., 210 Fed. (2d) 769, CCA 9, 1954;

Lobello v. Dunlap, 210 Fed. (2d) 465, CCA 5, 1954.

The authorities are equally clear to the effect that if the liquidation is conducted in such manner as to constitute an entry into the real estate business, the taxpayer will not be entitled to the capital gain treatment permitted by Sec. 117(j) of the U. S. Int. Rev. Code.

The Home Co. Inc. v. Commissioner of Int. Rev., 212 Fed. (2d) 637, CCA 10, 1954;

Rollingwood Corp. v. Commissioner of Int. Rev., 190 Fed. (2d) 263, CCA 9, 1952.

The decision as to whether capital gain treatment will be allowed in any particular case has been said to depend on the facts of each particular case. In the case of *Lobello v. Dunlap,* 210 Fed. (2d) 465, CCA 5, 1954, the Court said at page 468:

> "The expression 'property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business' would appear to be as simple, explicit and easily understood as the customs of business would permit. It has, nevertheless, proved difficult of application, and has been the subject of repeated consideration by this Court. (Citing cases) The cases cited illustrate that no rigid rule or fixed formula will furnish an answer to the question. Among the helpful factors that will point the way are: continuity and frequency of sales and sales related activities as opposed to isolated transactions; the extent and substantiality of the transactions; the activity on the part of the taxpayer or those under his instructions in the form of advertising and improvements; the purpose for which the property was acquired; and all other considerations going to the ultimate question of whether at the time of sale the property was held by the taxpayer primarily for sale to customers and also for sale in the ordinary course of the taxpayer's trade or business. Since the question is one of ultimate fact (citing cases), the judgment of the district court should be affirmed unless found to be clearly erroneous."

In the *Lobello* case the Court affirmed the lower Court in part and reversed it in part, holding that as to one tract the property was entitled to capital

gain treatment and as to another tract, the property should not be entitled to capital gain treatment.

In the case of *Robert W. Dillon v. Commissioner,* supra, the decision was for the taxpayer, and allowed capital gain treatment of the gains derived from the defense housing liquidation. In the case of *The Home Co. Inc. v. Commissioner of Int. Rev.,* supra, the decision denied the taxpayer the right to capital gain treatment of the gains derived on the liquidation of defense housing project. In the *Dillon* case, the Court concluded that the taxpayer did not go into the real estate business in accomplishing the liquidation, whereas the Court in *The Home Co. Inc.* case was of the opinion that the taxpayer engaged in the real estate business when liquidating the defense housing project. Notwithstanding the contrary conclusion, the *Dillon* case approved the rule announced in the case of *The Home Co. Inc.* which was stated as follows:

> "One may, of course, liquidate a capital asset. To do so it is necessary to sell. *The sale may be conducted in the most advantageous manner to the seller and he will not lose the benefits of the capital gain provision of the statute, unless he enters the real estate business and carries on the sale in the manner in which such a business is ordinarily conducted.* In that event, the liquidation constitutes a business and a sale in the ordinary course of such a business and the preferred tax status is lost." 212 Fed. (2d) at page 641. (Emphasis supplied.)

In our case the Court found (Finding 14, R. 47, 48) the following facts concerning the method used by appellant in disposing of the houses here in issue:

"Because of the wartime and postwar demands for houses, plaintiff's houses were sold without the necessity of engaging in extensive advertising or sales compaigns. The houses in effect sold themselves. The absence of 'For Sale' signs on the tracts had a sales motive and was a deliberate sales technique of plaintiff to give prospective customers a sense of scarcity of available houses for sale and thereby make the house being sold seem more desirable. Most of the sales were made by plaintiff's salaried tract managers but where their efforts were not sufficient, sales were effected through real estate brokers on a commission basis. Plaintiff's selling activities under the circumstances, together with the frequency and continuity of sales, were sufficient to constitute a trade or business of selling houses."

Contrary to the conclusion reached by the Court in the above-numbered Finding 14, the procedure followed by appellant in disposing of its rental properties did not follow the pattern of advertising and other sales promotion techniques used by persons holding real estate primarily for sale to customers in the ordinary course of their trade or business. The procedure followed by appellant involved a gradual, passive liquidation of a substantial investment in rental properties, which for the reasons heretofore stated in this brief, appellant did not consider appropriate to continue to hold and operate.

Section 117(j) U. S. Internal Revenue Code (App. p. i) does not by its terms, or by any implication, require that capital gain treatment be restricted to persons who make only a limited number of sales in

a taxable period. Instead, under the rule as stated in the case of *Robert W. Dillon,* supra, the sales (in liquidation) may be conducted ". . . in the most advantageous manner to the seller . . ."

(g) The Court Erred in Finding and Concluding Without Any Supporting Evidence That the Board of Directors of Appellant on December 9, 1943 Authorized the Future Sale of Appellant's Houses and That the Chairman of the Board of Directors of Appellant Expressed the Intention of Appellant to Sell Its Houses and That Thereafter Appellant's Intention Was to Pursue Whichever Activity, Renting or Selling, Proved More Profitable.

Finding No. 6 made by the Court reads as follows:

> "On December 9, 1943, the Board of Directors of plaintiff authorized the future sale of plaintiff's houses and ratified past sales. At that meeting the Chairman of the Board of Directors of plaintiff expressed the intention of plaintiff to sell its houses. Thereafter plaintiff's intention was to pursue whichever activity, renting or selling, proved more profitable." (R. 45.)

The foregoing finding misstates the Board of Directors' resolution to which it refers. The Directors' resolution of December 9, 1943 is set forth in full at page 155 of the Record. Contrary to finding 6, the resolution does not "authorize" the future sale of plaintiff's houses. The resolution, instead, authorizes the execution of deeds "and other documents which *may* be necessary or desirable in connection with such sales as *may* hereafter be made of real property owned by this corporation" (emphasis supplied). Such language is consistent with, and required, be-

cause of sales theretofore made and thereafter to be made pursuant to then existing purchase option tenants. The resolution *does not,* as stated in the finding, *authorize* the future sale of houses.

Finding 6 is directly contrary to the evidence to the extent that it states that at the December 9, 1943 meeting the Chairman of the Board of Directors expressed the intention of plaintiff to sell its houses. The preamble to the resolution (and on which preamble the finding presumably relies), says merely that "The Chairman then stated that the corporation had sold and would in the future sell some of the homes owned by it . . ." This quoted language does not express an intention of the appellant to sell its houses. The statement was merely that the corporation would sell "some of the homes owned by it", which statement merely recognized the necessity of conveying some of appellant's houses pursuant to the outstanding purchase options, then held by some tenants.

The balance of finding 6 (R. 45) reading,

> ". . . Thereafter, plaintiff's intention was to pursue whichever activity, renting or selling, proved more profitable",

has no support in the record, since the two premises on which it is based are unsupported by the resolution of December 9, 1943.

However, if this Court believes Finding 6 correctly states the effect of the December 9, 1943 resolution, then:

(a) Such finding is contradictory to and irreconcilable with Findings 8 and 15 which purport to fix a different date from which appellant held its houses for sale to customers. This would constitute a failure to conform with the rule stated in *McGah v. Commissioner,* 193 Fed. (2d) 662, CCA 9 (1952), where the Court remanded a similar case to the Tax Court and said at page 663:

> ". . . There was, however, no finding as to whether the 14 houses were so held prior to their sale, or as to *when* and how long, if at all, the 14 houses were so held prior to their sale. Such findings should be made." (Emphasis supplied); and

(b) Contradictory and irreconcilable findings on matters material to a proper disposition of the case are obviously self-destructive, and the Appellate Court should reverse the judgment because such findings cannot disclose the basis for the trial Court's decision as required by Rule 52(a).

Maher v. Hendrickson, 188 Fed. (2d) 700, 702 (C.A. 7, 1951).

(h) The Rules Stated by This Court in McGah v. Commissioner, 210 Fed. (2d) 769 (1954) Require a Decision in Favor of Appellant.

(1) Two Types of Property Sales.

In our case we have gains from two types of house sales, namely:

(a) Sales in the Homewood Tract to tenants who held purchase options (which gains *are not* in issue on this appeal); and

(b) Other sales in Homewood and all sales in Southwood and Shoreview Tracts (which gains *are* in issue on this appeal except 7 houses sold prior to the tax years here involved).

This Court, in *McGah v. Commissioner of Internal Revenue,* supra, stated that

> "Petitioners Lucille McGah . . . were at all pertinent times engaged in the trade or business of renting and selling houses in San Leandro, California . . ." (210 Fed. (2d) at page 770).

The fact that the petitioners in the *McGah* case were at the same time engaged in two businesses, namely, the business of *"renting and selling"* houses, did not prevent this Court from segregating the two and holding that the petitioners were entitled to capital gain treatment on the sale of 14 houses which had been "used" in their trade or business by renting same.

In *Lobello v. Dunlap,* 210 Fed. (2d) 465, CCA 5, 1954, the Court also decided that as to one tract the taxpayers were taxable at ordinary income tax rates on gains from sales, whereas, the gains on sales from another tract were treated as capital gains and taxed accordingly.

(2) Findings 8 and 16 (R. 46, 48), Do Not Conform With Rule 52(a) and the Decision in McGah v. Commissioner.

This Court, in *McGah v. Commissioner,* 193 Fed. (2d) 662, said at page 663:

> ". . . There was, however, no finding as to whether the 14 houses were so held prior to their sale, or as to *when and how long,* if at all, the

> 14 houses were so held prior to their sale. Such findings should be made . . ." (emphasis supplied).

Findings 8 (R. 46) and 16 (R. 48) do not specify "when and how long" the houses here in issue were held primarily for sale to customers in the ordinary course of business. Findings 8 and 16 fail to find on a material issue and, therefore, do not conform with Rule 52(a) Federal Rules of Civil Procedure.

(3) The Circumstances Surrounding Appellant's Liquidation of the Houses Here in Issue Are Comparable With the Compulsion Under Which the 14 Houses Were Sold in the McGah Case.

We have previously set forth in this brief how appellant's decision in early May, 1945 to liquidate resulted from the misuse of the properties by tenants and adverse economic conditions incident to the end of hostilities in Europe (ante, pp. 22-24).

In *McGah v. Commissioner,* supra, this Court (210 Fed. (2d) at page 772) stated that it found no support for the conclusion that prior to the date the petitioners were pressed by the bank to sell some of the houses they had changed their admitted purpose of holding the properties for rent to holding them for sale. In our case we have shown that up to the time of the decision to sell the houses as they became vacant (on or about May 10, 1945) the houses had been held for rental (ante, pp. 19-21). Appellant's decision to sell was induced by an external economic compulsion which differed merely in form, but not in effect, from that involved in *McGah v. Commissioner,* supra. The

decision in our case should be the same as in the *McGah* case.

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2. CONCLUSION.

The trial Court erred in finding and concluding that the houses here in issue were ever held primarily for sale to customers, and erred in failing to hold that the sales of houses made by appellant constituted the liquidation of an investment to which the capital gain provisions of section 117(j) U.S. Internal Revenue Code are applicable. The trial Court, pursuant to paragraph 15 of the Stipulation (R. 29) should have directed that Appellant was entitled to capital gain treatment on the following houses sold by it:

(a) 55 houses in the Homewood Tract (App. p. iii, column 2);

(b) All of the houses in the Southwood Tract;

(c) All of the houses in the Shoreview Tract, except the 7 houses sold immediately upon construction and prior to the tax years here involved.

Dated, San Francisco, California,
August 26, 1955.

L. W. WRIXON,
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(Appendix Follows.)

Index to Appendix

Appendix.

Appendix

SECTION 117(j) UNITED STATES INTERNAL REVENUE CODE.

(j) Gains and Losses from Involuntary Conversion and from the Sale or Exchange of Certain Property Used in the Trade or Business.

"(1) Definition of property used in the trade or business.—For the purposes of this subsection, the term 'property used in the trade or business' means property used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(l), held for more than 6 months, and real property used in the trade or business, held for more than 6 months, which is not (A) property of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or (B) property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or (C) a copyright, a literary, musical, or artistic composition, or similar property, held by a taxpayer described in subsection (a)(1)(C). Such term also includes timber or coal with respect to which subsection (k)(1) or (2) is applicable and unharvested crops to which paragraph (3) is applicable. Such term also includes livestock, regardless of age, held by the taxpayer for draft, breeding, or dairy purposes, and held by him for 12 months or more from the date of acquisition. Such term does not include poultry.

"(2) General Rule.—If, during the taxable year, the recognized gains upon sales or exchanges of prop-

erty used in the trade or business, plus the recognized gains from the compulsory or involuntary conversion (as a result of destruction in whole or in part, theft or seizure, or an exercise of the power of requisition or condemnation or the threat or imminence thereof) of property used in the trade or business and capital assets held for more than 6 months into other property or money, exceed the recognized losses from such sales, exchanges, and conversions, such gains and losses shall be considered as gains and losses from sales or exchanges of capital assets held for more than 6 months. If such gains do not exceed such losses, such gains and losses shall not be considered as gains and losses from sales or exchanges of capital assets . . ."

EXHIBIT No. 5 (R. 36)

Pacific Homes, Inc.—Homewood Tract

Summary Showing Sales of Houses, All But One of Which (Footnote c) Were Originally Occupied by Tenants Under Leases With 30-Month Options to Purchase (Homewood Tract)

Month and Year	Col. 1 Sales to Tenants Holding Purchase Options	Col. 2 Sales Made After Purchase Options Had Terminated and After Houses Had Been Occupied by New Tenant Under Simple Lease Without Purchase Option	Col. 3 Sales Made More Than 30 Months After Last Purchase Option Agreement Executed and Not Included in Columns 1 or 2	Col. 4 All Other Sales	Col. 5 Number of Houses on Hand First of Each Month	Col. 6 Number of Months from Date House Completed (Sept. 1/42) to Date House Sold
1942						
June					50	
July					89	
August					156	
September					212	
October					212	
November					212	
December					212	
1943						
January					212	
February					212	
March					212	
April	1				212	7
May					211	
June	2				211	9
July					209	
August					209	
September					209	
October					209	
November	1				209	14
December				1(a)	208	15
1944						
January				1(a)	207	16
February					206	
March					206	
April					206	
May					206	
June	1				206	21
July	1				205	22
August	1				204	23
September	1				203	24
October	9				202	25
November	9				193	26
December	8				184	27
1945						
January	8				176	28
February	12				168	29
March	19				156	30
April	17	3			137	31
May	7	3		1(b)	117	32
				1(a)		
June	9				115	33
July	7			1(a)	96	34
August	9	2	1	1(c)	88	35
September	4				75	36
October	2	1	1		71	37
November	5	3			67	38
December	2	2			59	39
1946						
January	1	5	1	1(a)	55	40
February	2	5	2		47	41
March	1	10	1	1(a)	38	42
April	2	5			25	43
May		7	1		18	44
June		5		1(b)	10	45
July					4	
August		4			4	47
September					0	
Totals	141	55	7	9		
				6(a)		
				2(b)		
				1(c)		
				9		

(a) These houses were sold less than 30 months after the last purchase option agreement was executed.

(b) Unable to ascertain complete lease history. However, houses were completed and sold respectively June 1, 1942—May, 1945 and July, 1942—June, 1946, periods of 37 and 47 months. Original purchase option lease agreements were dated August, 1942, and September, 1942, respectively.

(c) This house does not show evidence of a signed lease agreement. However, it was completed in August, 1942, and sold in August, 1945, a period of 36 months.

Construction commenced approximately January, 1942

Construction completed approximately September, 1942.

EXHIBIT No. 6 (R. 37)

Pacific Homes, Inc.—Southwood Tract

Summary Showing Sales of Houses at Southwood Tract—None of Which Were Ever Occupied by Tenants Under Leases With Options to Purchase

Month and Year	Sales to Non-tenants	Sales to Tenants	Number of Houses on Hand First of Each Month	Number of Months from Date House Completed (January 1, 1944) to Date House Sold
1944				
January			72	
February			72	
March			72	
April			72	
May			72	
June			72	
July			72	
August			72	
September			72	
October			72	
November			72	
December			72	
1945				
January			72	
February			72	
March			72	
April		2	72	15
May	5(a)	1	70	16
June		1	69	17
July	1		63	18
August	1		62	19
September	3		61	20
October	3		58	21
November	5	1(b)	55	22
December	1		49	23
1946				
January	2		48	24
February	3		46	25
March	7	7	43	26
April	7	3	29	27
May	12		19	28
June	4	3	7	29
July	1		0	30
Totals	55	18		

(a) One of these was sold to the manager of the tract who had been allowed to transfer his option from the Homewood tract.

(b) Sold twice.

Construction commenced approximately August, 1943.

Construction completed approximately January, 1944

EXHIBIT No. 7 (R. 38)

Pacific Homes, Inc.—Shoreview Tract
Summary Showing Sales of Houses at Shoreview Tract—None of Which Were Ever Occupied by Tenants Under Leases With Options to Purchase

Month and Year	Sales to Nonteonants	Sales to Tenants	(a) Other	Number of Houses on Hand First of Each Month	Number of Months from Date House Completed (February 1, 1944) to Date House Sold
1943					
October			1		
November			4		
December			2		
1944					
January				53	
February				56	
March				56	
April				56	
May				56	
June				56	
July				56	
August				56	
September				56	
October				56	
November				56	
December				56	
1945					
January				56	
February				56	
March				56	
April		1		56	14
May				55	
June	2			55	16
July				53	
August	5			53	18
September	1	1		48	19
October	2			46	20
November	5			44	21
December	1	5		39	22
1946					
January	3	1		33	23
February	3	7		29	24
March	10	2		19	25
April	2			7	26
May	3	1		5	27
June				1	28
July				0	
Totals	38	18	7		

(a) This column represents sales where no writt en lease agreements were located in the file for each house.

Construction commeneed approximately July, 1943.

Construction completed approximately February, 1944.

[Endorsed]: Filed December 13, 1954.